



TEXAS EDUCATION AGENCY

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MIKE MOSES
COMMISSIONER OF EDUCATION

RECEIVED

May 14, 1997

MAY 15 1997

Opinion Committee

The Honorable Dan Morales
Attorney General of Texas
Price Daniel Building
P. O. Box 12548
Austin, Texas 78711-2548

RQ-942

FILE # MC-39557-97
I.D.# 39557

Dear General Morales:

We are writing to request an opinion regarding the requirements of Sections 28.002 and 28.004 of the Texas Education Code.

Section 28.002 generally establishes the process by which the State Board of Education adopts curriculum for Texas public schools. The State Board is currently in the process of adopting a comprehensive revision of the curriculum by considering the "essential knowledge and skills" of each subject in a document commonly referred to as "TEKS". Section 28.004 requires a school district which chooses to provide instruction regarding human sexuality and several related topics (hereafter collectively referred to as "human sexuality") to "select course materials and instruction" relating to those topics with the advice of a "local health education advisory council". It also requires that five elements of instruction be included in any course materials and instruction selected.

Questions have been raised regarding the possible effect of Section 28.004 on the State Board's ability to adopt TEKS under Section 28.002, specifically TEKS regarding human sexuality in the proposed health curriculum. Enclosed are four opinions delivered to the State Board on May 8 as well as an opinion from agency counsel regarding the same issues.

Our questions are as follows:

Do the provisions of Section 28.004 in any way limit the authority granted to the State Board of Education under Section 28.002 to develop the TEKS?

If your answer to the preceding question is "yes", what limits exist? Are those limits different for the foundation and enrichment curriculums? Must the required five elements of instruction set out in Section 28.004(a) be included in or excluded from any curriculum developed under Section 28.002 which deals with the topics covered by Section 28.004?

May the State Board of Education adopt for placement on an approved list under Section 31.023 of the Texas Education Code a textbook which addresses human sexuality but which does not contain the required five instructional elements under Section 28.004(a)? May the State Board place on an approved list a textbook which does contain those elements?

The Honorable Dan Morales
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May a school district adopt for local use a "textbook" under Chapter 31 of the Education Code which contains material inconsistent with the course of instruction selected by the local school board under Section 28.004? May the local school board adopt a textbook and selectively use the components in a manner which complies with the local course of instruction under Section 28.004 despite the textbook containing other inconsistent material?

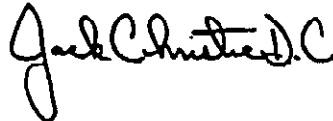
Thank you for your prompt attention to this request. The curriculum is scheduled for final adoption in July of this year, and we would deeply appreciate your guidance.

Sincerely,



Mike Moses
Commissioner of Education

Sincerely,



Jack Christie, D.C., Chairman
State Board of Education

Enclosures

**TEXAS JUSTICE FOUNDATION**

8122 DATAPOINT, SUITE 612 SAN ANTONIO, TEXAS 78229 210-614-7157 FAX: 210-614-2649

MEMORANDUM**TO:** State Board of Education**FROM:** Allan E. Parker, President, Texas Justice Foundation**RE:** Inclusion of Human Sexuality in Health TEKS-Legality

While health is a required subject in the enrichment curriculum under TEKS, there is a separate provision of the education code which deals with human sexuality instruction, TEC § 28.004. In construing a code, the more specific provisions of the statute control over the general provisions under normal rules of construction. Thus, with respect to human sexuality instruction, TEC § 28.004 is the more specific and controlling provision.

Under TEC § 28.004(a), "any course materials and instruction relating to human sexuality, sexually transmitted diseases, or human immuno deficiency virus or acquired immune deficiency syndrome shall be selected by the Board of Trustees of a school district with the advice of the local health education advisory council established under Subsection (e) ..." (emphasis added). Since the TEKS mandates instruction, it is clear that human sexuality instruction must mandatorily be selected by the local Board of Trustees, rather than the State Board of Education. It is clear that the legislature intended for the highly sensitive subject of human sexuality instruction not to be taught on the basis of a statewide mandate, but rather on the basis of local decisions reflecting local input and reflecting community values at the local level.

This strong emphasis on local control is further reflected in TEC § 28.004 (e) which mandates that a school district establish a local health education advisory council to assist it in "insuring that local community values and health issues are reflected in the district's human sexuality instruction." The TEKS currently drafted violate this provision on human sexuality instruction by determining when various matters related to human sexuality are age appropriate. However, TEC § 28.004 (f) states that it is the local advisory council's duty to "recommend appropriate grade levels for human sexuality instruction", and recommending the "number of hours of instruction" to be provided in health education, and recommending the "methods of instruction" to be used by a teacher in human sexuality instruction. Including human sexuality instruction in the TEKS would violate the legislature's intent for the local community to determine when sex material is age appropriate and how much time should be spent on the subject.

The desire for local control is further reflected in TEC § 28.004 (g) which states that the local advisory council must include persons who represent "diverse views" in the community, including "parents as a majority of the council", and may include teachers and

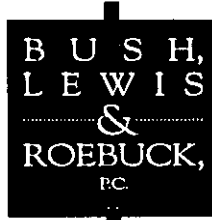
health care professionals. This evidence is the legislature's clear intent that it will not be health professionals and teachers who dominate the discussion and debate about human sexuality instruction, but rather parents.

Finally, even if a position excluding all human sexuality instruction from the TEKS health guidelines were not adopted, the requirements of § 28.004 (a) (1), (2), (3) (4) (5) would have to be included in the TEKS. Again these items are legislative mandates and require that abstinence be taught as the preferred choice of behavior, and that more attention be devoted to abstinence from sexual activity than to any other behavior, etc.

In summary, health matters, other than human sexuality instruction, should be addressed in the TEKS enrichment curriculum pursuant to the general instructions to the State Board. However, human sexuality instruction, should be left to the local boards pursuant to the more specific instruction to the State Board in TEC § 28.004.

David W. Starnes

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Attorneys at Law

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May 6, 1997

Mr. David Bradley
615 N. 5th Street
Beaumont, TX 77701

Dear Mr. Bradley:

I have reviewed the Texas Education Code as you requested and have come to the conclusion that Section 28.004 entitled "Human Sexuality Instruction" prohibits the State Board of Education from establishing essential knowledge and skills for any subject of the foundation or enrichment curriculum if the subject is to include "human sexuality instruction" as defined in Section 28.004. There are two reasons for the prohibition. First, Section 28.004 requires local school districts to decide whether or not to offer such instruction upon the advice and consent of the "local health education advisory council". Second, the "local health education advisory council" established in Section 28.004 (e) has a duty to set the standards and content of "human sexuality instruction" and to recommend appropriate age levels at which such instruction shall take place in that community. The State Board of Education has no authority to establish essential knowledge and skills for any subject that contains "Human Sexuality Instruction".

The proposed essential knowledge and skills for health if adopted by the State Board of Education would be unlawful and a direct violation of Section 28.004 of the Texas Education Code. If the State Board of Education adopts the proposed essential knowledge and skills for health, they have dictated the age levels at which human sexuality instruction shall be had and the parameters for such instruction. By incorporating human sexuality instruction in the essential knowledge and skills for health, the publishers for the health textbooks will be free to include human sexuality in the health textbooks which would usurp the authority and right of the local school districts to decide whether or not to offer such instruction and if selected, to decide at what age levels the parameters for instruction will be offered.

It is obvious that the Texas Legislature intended for separate essential knowledge and skills for health on the one hand and human sexuality instruction on the other. Therefore, I would recommend that the State Board of Education adopt a set of essential knowledge and skills for health and separate essential knowledge and skills for human sexuality instruction, both of which could be used as guidelines for local school districts. As the proposed document now reads, one can anticipate a multitude of lawsuits over the usurpation of local control by the State Board of Education concerning "Human Sexuality Instruction".

Very truly yours,



David W. Starnes

DWS/mg

Bush, Lewis & Roebuck, P.C.

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May 6, 1997

VIA FACSIMILE (409) 833-5134

Mr. David Bradley
State Board of Education
District 7
615 North Fifth St.
Beaumont, Texas 77701

Re: State of Texas Health Curriculum Standards

Dear Mr. Bradley:

In response to your request, I am writing to set out the legal opinion of the American Center of Law and Justice with respect to whether the State Board of Education, pursuant to § 28.002(d) of the Texas Education Code, has the authority to identify essential knowledge and skills for health which include components related to human sexuality education. In summary, our conclusion is that the Texas State Board of Education does not have the authority to identify essential knowledge and skills which include components relating to human sexuality instruction.

As you know, § 28.002 of the Texas Education Code provides that "each school district... shall offer as a required curriculum... an enrichment curriculum that includes... health." In turn, § 28.002(d) of the Texas Education Code provides, in pertinent part, that "each district shall use the essential knowledge and skills identified by the board as *guidelines* in providing instruction in the enrichment curriculum." Accordingly, the State Board of Education clearly has the authority to enact "guideline" essential knowledge and skills for the subject of health as a general matter.

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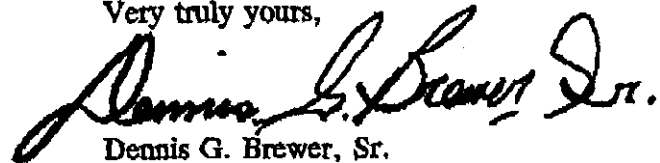
However, § 28.004 of the Texas Education Code, governing human sexuality instruction, clearly provides "any course materials and instruction relating to human sexuality... shall be selected by the Board of Trustees of a school district with the advice of the local health education advisory council...". Accordingly, § 28.004 absolutely removes all authority relating to human sexuality instruction from the State Board of Education and grants that authority to local school districts. As a result, in order for both § 28.002 and § 28.004 to be give full effect,

§ 28.002 must be construed to relate only to the subject of health in general, and not to any instruction relating to human sexuality.

It should be noted that such a construction follows the rules for statutory construction set out in the Texas Code Construction Act. Specifically, § 311.026 of the Texas Government Code provides, that if a general provision (such as § 28.002 of the Texas Education Code) conflicts with a special or local provision (such as § 28.004 of the Texas Government Code), the provisions should be construed such that effect is give to both. The only reasonable manner construction of both § 28.002 and § 28.004 of the Texas Education Code which gives full effect to both provisions is that § 28.004 operates as an exception to the general provisions of § 28.002. In other words, while the State Board of Education is required to identify essential knowledge and skills relating to health in general, the State Board of Education is prohibited from any involvement relating to the instruction on the subject of human sexuality. Accordingly, we are of the opinion that the Texas Board of Education does not have authority to identify essential knowledge and skills relating to human sexuality instruction.

Please contact me if you have any questions or comments with regard to the foregoing.

Very truly yours,



Dennis G. Brewer, Sr.

DGBSR/kb

cc: John Steponovich

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May 6, 1997

The Honorable David Bradley
State Board of Education Member
District 7
615 N. 5th Street
Beaumont, TX 77701

Dear Board Member Bradley:

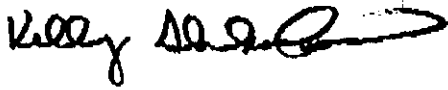
It is my understanding that the Texas State Board of Education ("SBOE") is being asked to adopt curriculum standards, including enrichment curriculum on the subject of health. It is also my understanding that the health curriculum standards presented for adoption include "human sexuality instruction."

Please be aware that state law specifically precludes the SBOE from exercising authority over "human sexuality instruction" and places such authority for course materials and instruction squarely in the hands of the local school districts. *Texas Education Code section 28.004 (a)*. An SBOE attempt to exercise authority over human sexuality curriculum and instruction would violate state law. The SBOE should not include human sexuality instruction within its health curriculum standards.

As you are aware, the subject of sexual education is a very sensitive subject over which many families hold deeply felt opinions. For this reason, the Legislature wisely reserved this subject to the local level, allowing more direct input by the families whose children would be directly impacted by this instruction. The SBOE should heed this wisdom of the Legislature as well the law itself and leave these decisions to the local school districts and their families.

Please feel free to call me if you have any questions.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'Kelly Shackelford', with a stylized flourish at the end.

Kelly Shackelford, Esq.
Southwest Regional Coordinator

KS/MS



TEXAS EDUCATION AGENCY

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MIKE MOSES
COMMISSIONER OF EDUCATION

May 13, 1997

Dr. Mike Moses
Commissioner of Education
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701

Re: State Board Authority Regarding TEKS/Education Code Section 28.004

Dear Dr. Moses:

This is in response to the issues raised in several letters regarding the State Board of Education's authority to adopt essential knowledge and skills ("TEKS") under Section 28.002 of the Education Code in light of the provisions of Section 28.004 regarding a school district's human sexuality instruction. My opinion is that the provisions of Section 28.004 do not restrict the State Board's discretion or authority to adopt TEKS under Section 28.002.

Section 28.002 requires each school district to offer "as a required curriculum" certain curriculum listed as "foundation curriculum" or "enrichment curriculum" in subsection (a). The State Board is authorized to "identify the essential knowledge and skills of each subject" in the foundation and enrichment curriculums under subsections (c) and (d). Those same subsections require a school district to provide instruction in the foundation curriculum TEKS as a condition of accreditation, but only require a district to use the enrichment curriculum TEKS as "guidelines in providing instruction".

Section 28.004 requires that any "course materials and instruction relating to human sexuality, sexually transmitted diseases, or human immunodeficiency virus or acquired immune deficiency syndrome shall be selected by the board of trustees of a school district with the advice of the local health education advisory counsel" and must contain five areas of instruction set out in subsection (a). Subsection (d) again states that the "board of trustees of a school district shall determine the specific content of the district's instruction in human sexuality", in accordance with that section. Other provisions in the section address the makeup of the advisory council.

As I read those sections, 28.002 grants the State Board very broad authority to adopt TEKS for subjects within the foundation and enrichment curriculum. School districts are

required to follow the TEKS in the foundation curriculum, but need not do so in the enrichment curriculum. To the extent a school district chooses to provide instruction in human sexuality, however, the requirements of Section 28.004 must be met.

My understanding is that a question has been raised as to whether the State Board may adopt TEKS which would cover human sexuality in a health course, part of the enrichment curriculum. I also understand that the proposed TEKS for health track some of the five items of required instruction in Section 28.004(a). Under those circumstances, there is no potential conflict between the statutes as the State Board is considering adoption of TEKS which a district is not required to use but which include provisions which it must comply with should the district determine to provide instruction in human sexuality. If anything, inclusion of required items protects a school district by ensuring that a health textbook adopted locally can be used in compliance with Section 28.004. Both statutes can be given complete effect without restricting the scope of action by either the State Board or the local board of trustees.

A more difficult question would arise if the TEKS proposed were in direct conflict with the requirements of Section 28.004. However, even were that the case, I believe that the State Board's authority under Section 28.002 is not limited by the restrictions on local school districts under Section 28.004. Were that conflict to occur, the district would not be able to select for use any part of a textbook which failed to comply with Section 28.004. The primary purpose in construing statutes is to give full effect to both. As Sections 28.002 and 28.004 apply to different bodies, they do not conflict in a manner requiring a limitation of either. Obviously, the prudent course of conduct is what the State Board has proposed--to protect the local district by ensuring that the TEKS adopted allow it to use a textbook consistent with Section 28.004.

While not dispositive, I believe some of the concern is generated by the assumption that all of a "textbook" placed on an approved list by the State Board under Section 31.023 and adopted by a local district is automatically "course materials" under Section 28.004. "Textbook" is defined very broadly in Section 31.002(3) and can contain multiple books, CDs, computer programs or other materials. It would appear that "course materials" as used in Section 28.004 would include only those parts of a "textbook" actually used in the course, as well as any additional materials generated locally for use in the course. While a district is required to limit its instruction and course materials to the locally-determined parameters of human sexuality instruction, the mere presence of other materials in a book does not necessarily make it "course materials". That language would allow a district to adopt a textbook and simply choose not to make use of those parts which it has locally determined to be inappropriate. For example, a district could use different parts of a textbook for different ages or in different classes according to parental wishes. That type of flexibility seems to me precisely what the "guideline" language in Section 28.002 contemplates.

Dr. Mike Moses
May 13, 1997
Page 3

I believe it is important to note that nothing in Sections 28.002 or 28.004 requires the State Board to adopt TEKS which touch on human sexuality. That decision, like all of the TEKS, is left to the discretion of the Board within very broad limits. Similarly, a local school board is not required to provide instruction in human sexuality but may do so by decision of the local board with the advice of the local advisory committee. Should a district decide to provide such instruction, any course materials used must comply with Section 28.004. A publisher would also be free to develop a health textbook without meeting the TEKS for human sexuality instruction which districts could purchase from the nonconforming list under Section 31.023.

Finally, some of the discussion at the Board meeting involved the fact that the proposed health TEKS contain grade levels for various parts of the health curriculum. Section 28.004 leaves to the discretion of the local board and advisory committee the determination of appropriate grades for human sexuality instruction. As the health TEKS are guidelines only, a district would be free to use a textbook or the curriculum in a grade different from that for which the TEKS are adopted.

I hope this answers the questions raised.

Sincerely,

A handwritten signature in black ink, appearing to be 'David Anderson', written over a horizontal line.

David Anderson
Chief Counsel